Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

(2)

No. 91-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARDSON ENGINEERING COMPANY,
Petitioner,

v.

WILLIAM L. CROW CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

KAREN M. LOCKWOOD
COLLIER, SHANNON & SCOTT
3050 K Street, N.W.
Washington, DC 20007
(202) 342-8400
Counsel for Respondent

July 31, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the courts below properly recognized that a belated post-appeal recusal motion was unwarranted under circumstances in which the court's impartiality would not reasonably be questioned.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court of Appeals were Richardson Engineering Company, appellant, and William L. Crow Construction Company, appellee.

The parties before the District Court were William L. Crow Construction Company, plaintiff and counterclaim-defendant; Richardson Engineering Company, defendant and counterclaim-plaintiff; and Harry A. Richardson, Jr., defendant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT	2
The Earlier Petition	2
This Instant Petition	3
REASONS THE PETITION SHOULD BE DENIED	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
In re Allied Signal, Inc., 891 F.2d 967 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2561 (1990)	5, 7
Bartel Dental Books Co. v. Schultz, 786 F.2d 486 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986)	5
In re Beard, 811 F.2d 818 (4th Cir. 1987)	5
In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989)	4, 6
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)	4, 6, 7
Mavis v. Commercial Carriers, Inc., 408 F. Supp. 55 (C.D. Cal. 1975)	6
McWhorter v. Birmingham, 906 F.2d 674 (11th Cir. 1990)	5
In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986)	6
In re United States, 666 F.2d 690 (1st Cir. 1981)	5
Richardson Engineering Co. v. Crow Construction Co., No. 88-2093 (U.S. July 26, 1989)	3
United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985)	6
STATUTES	
11 U.S.C. § 541 (1989)	3
28 U.S.C. § 455 (1989)	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-7

RICHARDSON ENGINEERING COMPANY,
Petitioner,

v.

WILLIAM L. CROW CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent William L. Crow Construction Co. ("Crow")[1] respectfully opposes the petition for a writ of certiorari filed by Richardson Engineering Company ("Richardson"). This is the second attempt by Richardson to secure this Court's review on this ten-year-old case. After losing its first attempt on the merits two years ago, Richardson returned to the trial court with a recusal motion that failed. Now it would have this Court grant review based upon Richardson's personal conjecture and novel theory of recusal, which both the trial judge and the entire Court of Appeals rejected.

---

[1] Pursuant to Supreme Court Rule 29.1, Respondent states that William L. Crow Construction Company is a wholly owned subsidiary of J. A. Jones Construction Company, and its immediate parents, Jones Group, Inc. and Philipp Holzmann U.S.A., Inc., none of which is publicly traded. Their parent company is Philipp Holzmann A.G.

OPINIONS BELOW

The 36-page Opinion and Order of the District Court for the District of Vermont denying Richardson's post-trial and post-appeal motion for recusal is unreported, and is reprinted as Appendix C to Petitioner's brief. App. 6a-36a.

The unanimous summary affirmance of the United States Court of Appeals for the Second Circuit, filed on February 1, 1991, which is unreported, is reprinted as Appendix B. App. 3a-5a. The Court of Appeals' denial of Richardson's petition for rehearing and declination of the *en banc* suggestion, filed on April 2, 1991, is reprinted as Appendix A. App. 1a-2a.

STATEMENT

The First Petition

The first petition, filed on June 26, 1989, sought review of the merits of a dispute between Richardson, a subcontractor, and Crow, the general contractor on an express written subcontract for the construction of a semiconductor manufacturing plant in Burlington, Vermont.[2] On January 5, 1981, before Richardson's work was completed, Crow was forced to terminate Richardson for breaches of contract related to Richardson's multiple defaults on the subcontract, insolvency, inability to perform, and disastrous financial condition.

This lawsuit between Crow and Richardson Engineering followed. After six weeks of trial to a jury in March, 1988, the District Court entered judgment in favor of Crow. The Court of Appeals affirmed on February 3, 1989. It denied a petition for rehearing, with no judge

---

[2] The owner of the plant was International Business Machines Corporation ("IBM"). IBM was at no time a party to this lawsuit, nor did it have an interest in the outcome. In fact, Richardson sued IBM directly in Westchester County, New York, on its claims arising out of this building project. *See* App. 66a-67a.

asking that a vote be taken on Richardson's *en banc* suggestion.

Richardson thereupon filed its first petition for certiorari in this matter, hoping to obtain a new trial. *Richardson Engineering Co. v. Crow Construction Co.*, No. 88-2093 (U.S. July 26, 1989). This Court denied that petition on the first Monday in October, 1989.

The Instant Petition

Eight months after this Court's decision denying the first petition, Harry A. Richardson, Jr. himself endeavored to seek a new trial for Richardson by charging on May 29, 1990 that the trial judge should have been recused in the first place.[3] As grounds, relying upon 28 U.S.C. § 455(a), Richardson posited that a former law clerk, who did not work on the case, was the son of an IBM executive; that the judge had become casually acquainted with the clerk's father; and that the judge had accounts in certain non-party banks whose names were mentioned at trial.[4]

---

[3] Harry Richardson had been president and majority shareholder of Richardson Engineering Company. However, because the Company is in bankruptcy under Chapter 7, only the trustee has standing to pursue this matter. 11 U.S.C. § 541 (1989). Judge Coffrin only assumed, without deciding, that Harry Richardson had standing. App. 11a, n.5.

[4] The trial judge, Albert O. Coffrin, Chief Judge, carefully considered and denied Richardson's motion in a lengthy written opinion. App. C. He observed that IBM was not a party to the case and had no interest in the outcome. App. 22a. As to the law clerk argument, he found that the clerk did not participate in the case. The lawsuit had been assigned to a magistrate during the entire time the clerk worked for Judge Coffrin. App. 24a-26a. As to the casual acquaintance with the clerk's father, the court found that the acquaintance was merely social and was limited in nature. App. 27a-30a. As to the banks, the court found that they likewise were not parties and had nothing to gain or lose from the litigation. Thus, whether the trial judge owned stock in any of the banks was immaterial and had no bearing on the purely evidentiary role that the bank names played in the litigation. App. 30a-35a.

This second time around, the Court of Appeals held that none of the alleged bases for recusal presented the appearance of partiality that 28 U.S.C. § 455 is designed to avoid. App. 4a.[5] Richardson's petition for rehearing also was denied. No judge in the Circuit requested that a vote be taken on the *en banc* suggestion relating to the same issues addressed to this Court. App. 1a-2a.

REASONS THE PETITION SHOULD BE DENIED

Richardson seeks to elevate personal surmise and conjecture as to matters unique to Richardson's case to a level worthy of review by this Court. The holdings of the lower courts in this case, however, are entirely consistent with the uniform and well-founded case law regarding recusal. This case presents no issue to warrant invocation of this Court's certiorari jurisdiction.

The standard for recusal under section 455 is well-settled by this Court and among the circuits. The test for an appearance of partiality under section 455 is not the opinion of the disappointed or disgruntled litigant, but whether a reasonable person viewing the facts objectively would doubt the judge's impartiality. *E.g.*, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). Richardson would replace its private dissatisfaction based upon imagined circumstances for the objective, reasonable-observer test based upon undisputed facts.

The law clerk does not present a disqualifying circumstance, and Richardson does not seriously argue to the contrary here. IBM was not a party, and had no interest in the outcome. Further, disqualification of a judge is not required even when a law clerk who has a conflict of interest does not work on the case, as this clerk coin-

[5] As to Richardson's assertion that appellate panelists, too, should be recused, its motion for disqualification was denied. App. 49a.

cidentally did not. *E.g., In re Allied Signal, Inc.*, 891 F.2d 967 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2561 (1990); *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486, 490 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986).

Similarly, the acquaintance with the clerk's father does not present a disqualifying circumstance. It is uniformly held in a wide variety of circumstances going beyond those presented here that a judge's casual acquaintance or personal friendship, even with a party, does not create the appearance of partiality. *E.g., McWhorter v. Birmingham*, 906 F.2d 674, 679 (11th Cir. 1990) (friendship with Mayor of Birmingham); *In re Beard*, 811 F.2d 818, 828 (4th Cir. 1987) (friendship with president of company whose bankruptcy case was pending); *In re United States*, 666 F.2d 690, 696-97 (1st Cir. 1981) (friendship with individual tangentially related to litigation).

Nor does Richardson's effort to imbue IBM with some remote or contingent interest in this case aid its argument.[6] Remote, contingent or speculative interests are

---

[6] Richardson's laundry list of assertions by which it seeks to tie IBM to this case amounts to no more than prior misplaced assertions, erroneous interpretations of fragments of contract provisions, and plain misperception.

For example, as Judge Coffrin found, the cost-saving provision in the prime contract between Crow and IBM does not give IBM an interest in the outcome. The contract in operation here, between Crow and Richardson, was for a fixed price. App. 22a-24a. Also, a brief glance at the extra-record document that Richardson cites as an indemnification agreement demonstrates that, far from making IBM "liable," as Richardson asserts, it reaffirms that there is *no* agreement between IBM and Crow as to Richardson's claims. App. 38a, ¶5.

Richardson's reference to IBM's attendance at a settlement meeting only underscores that Richardson's claims against IBM were the subject of a separate lawsuit elsewhere. And Judge Coffrin made clear that Richardson's attempt to prop up its argument by referring to the first trial ending in a mistrial is both inaccurate and inapposite. App. 8a & n.3.

not the kind of interests that reasonably bring into question a judge's impartiality under section 455. *In re Drexel Burnham*, 861 F.2d at 1313-14; *see also In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir. 1986) (judge's ownership of stock in bank was not grounds for recusal because judge's interest in outcome of case was speculative and remote); *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55, 63 (C.D. Cal. 1975) (judge's ownership of stock in oil company did not require recusal in proceedings involving subsidiary of a company that had done business with his company).

Richardson's argument that the courts below departed from *Liljeberg* is wrong. The courts applied the objective, reasonable-observer test reiterated in that decision. Whereas the judge in that case was a governing officer of the entity that would directly and immediately profit as a result of the judge's decision, the judge in this case has no connection whatsoever to the only two parties that had an interest in this litigation—Crow and Richardson.

Richardson cites only one case in an effort to display some split between the circuits; but reliance on that case is unavailing. In *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), the court discussed a potential appearance of partiality resulting from the fact that the trial judge was the best of friends with the prosecuting attorney in a political corruption trial of another judge arising from the Operation Greylord investigations in Chicago.[7] Even there, the court narrowly limited its discussion to the particular facts of that sensitive case. *Id.* at 1538. Moreover, the passage of time between the trial

---

[7] In this case, IBM was not even a party. And, as demonstrated in the trial court's opinion, the acquaintance was purely social, contacts were infrequent, and business affairs were not a topic of conversation. App. 27a. The executive had no role in the lawsuit; he never appeared as a witness; nor was his name mentioned.

and the recusal motion as a matter of law made the recusal application untimely.[8]

This case similarly presents no policy issues worthy of this Court's certiorari jurisdiction. The review by all judges below yields a result squarely within the provisions of section 455 and the policy underlying it. Richardson apparently desires to create a new principle that recusal is required whenever a disgruntled litigant imagines attenuated connections between trial actors and non-parties. Such attenuated circumstances cannot justify recusal, however. That result would contravene the efficient administration of justice, and would fly in the face of the well-settled principle that our independent and strong judiciary, in applying section 455, should remain aware of the injustices that arise out of unwarranted disqualifications. *In re Allied-Signal*, 891 F.2d at 970. The courts below did the only proper thing; they declined to recuse because there are not grounds under section 455 to have done so.

CONCLUSION

For the reasons discussed herein, Crow respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

KAREN M. LOCKWOOD
COLLIER, SHANNON & SCOTT
3050 K Street, N.W.
Washington, DC 20007
(202) 342-8400
Counsel for Respondent

July 31, 1991

[8] Richardson's motion in this case was untimely as a matter of law, and this untimeliness provides independent grounds for rejection of its Petition. There is nothing here that suggests the need for recusal, let alone the extraordinary circumstances necessary to reopen lengthy and complex litigation three years after judgment was entered. *See Liljeberg*, 486 U.S. at 864; *In re Allied-Signal*, 891 F.2d at 973.